In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1368

VICTOR ACOSTA, JOSEPH BEDAMI, JR., AND ANTHONY CRAPERO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 526 F.2d 670. The opinion of the district court (Pet. App. A-7 to A-15) is reported at 386 F. Supp. 1072.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1976. A petition for rehearing was denied on February 23, 1976. The petition for a writ of certiorari, filed on March 25, 1976, is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in reinstating a guilty verdict that had been overturned by the district court on the ground of prosecutorial misconduct.

2. Whether this Court should review an issue not reached by the court of appeals, and not necessary to the resolution of this case, involving the power of a district court in criminal cases to overturn a jury verdict of guilty on grounds other than jurisdiction or sufficiency of the evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to import controlled substances unlawfully, in violation of 21 U.S.C. 952. Following the jury verdict, the district court dismissed the indictment on the ground of prosecutorial misconduct (Pet. App. A-7 to A-15). The court of appeals reversed (Pet. App. A-1 to A-6).

1. The evidence showed that co-defendant Louis Llerandi, Rudolph Limauro (a government informant), and petitioner Acosta met several times in early 1973 to plan the importation of narcotics from Colombia (Tr. 204-205).[1] Llerandi and Acosta instructed Limauro to secure the services of a pilot to fly the narcotics into the United States. Accordingly, Limauro introduced them to an undercover government agent, who thereafter flew to Colombia but failed to meet petitioners' representative, as planned (Tr. 255-257; 794-798).

Subsequently, all three petitioners met with Limauro and Lauro Parente, a Brazilian commercial pilot, who agreed to make the flight (Tr. 278, 282-288, 905-909). Petitioner Acosta then met with James Gore, a parolee and licensed pilot, who also was a government informant; Acosta told Gore that he had obtained the services of a Brazilian pilot who had access to an airplane sufficiently

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[1] "Tr." refers to the three-volume transcript of trial which has been lodged with the Clerk of this Court. Co-defendant Llerandi is presently a fugitive.

large for the journey and cargo; that on reentry into the United States there would be no further use of the Brazilian pilot; and that at that point Gore should take command of the aircraft and throw the Brazilian pilot out of the plane (Tr. 1022). Acosta gave Gore $5,000 to use as down payment for the aircraft (Tr. 1030). The contraband was never brought into the United States before the conspiracy terminated.

2. During trial, the defense several times moved to dismiss the case on the basis of specific instances of alleged prosecutorial misconduct. The court reserved ruling on the motions until the jury returned guilty verdicts against petitioners, whereupon the court dismissed the indictment because of the misconduct (Pet. App. A-7). Specifically, the court faulted the prosecution for eliciting from Limauro testimony that he had been convicted of only seven felonies whereas, on cross-examination, it was shown that he had been convicted of more than twenty felonies (Pet. App. A-9); failing to correct Limauro's statements, later shown by defense counsel to be false, that Limauro was unaware of certain state charges then pending against him (Pet. App. A-10), that the government had made no promises to him in exchange for his testimony (Pet. App. A-11), and that he had not been paid by the government in advance for his services as an informant (Pet. App. A-12); failing to inform the court and the defense of certain payments, shown by the defense to have been made to Limauro by the government after the alleged conspiracy had terminated (*ibid.*); and failing to furnish in a timely fashion vouchers to support other payments, shown by the defense to have been made to Parente by the government (Pet. App. A-14). The court also criticized government agents for falsely representing to Gore's parole officer that formal clearance had been obtained from the State to use Gore as an informant while he was on parole (Pet. App. A-14).

On appeal, the court of appeals reversed the dismissal of the indictment and remanded with instructions to reinstate the verdict, reasoning that the misconduct, while censurable, had not in fact prejudiced the outcome of the case and that therefore "due process does not require that [defendants] be given the 'reward' of having the jury verdict set aside and the indictment dismissed" (Pet. App. A-6).

ARGUMENT

1. The court of appeals correctly concluded that the district court had erred in dismissing the indictment after the jury verdict of guilty. Notwithstanding the alleged prosecutorial misconduct, the jury was fully apprised of all the above-mentioned factors that tended to cast doubt on the credibility of government witnesses. Indeed, the government's initial failure fully to disclose these factors, and their subsequent elicitation by the defense, was likely further to have damaged these witnesses' credibility. The jury nevertheless decided that petitioners were guilty as charged. As the court of appeals observed, "the tactics in issue had no prejudicial influence on the outcome of the case. If anything, those tactics, fully exposed to the jury, should have redounded to the benefit of the defense" (Pet. App. A-6). Since the alleged government misconduct could not have resulted in misleading the jury to petitioners' detriment, they were not in fact deprived of a fair trial, and the Due Process Clause does not require that they go unpunished for their crimes.

Petitioners nevertheless rely upon *United States* v. *Russell*, 411 U.S. 423, and *McNabb* v. *United States*, 318 U.S. 332, apparently for the proposition that if misconduct is sufficiently outrageous, due process principles should bar the government from invoking judicial process to obtain convictions. Neither case is apposite. In *McNabb*, of

course, the Court did not bar any prosecution, but rather held that a confession obtained during a period of unlawful detention should not be admitted in evidence. *Russell* was an entrapment case[2] in which the Court observed in dictum that there might be circumstances in which police conduct producing a criminal act by a defendant might be so outrageous as to bar trial for that act. In the present case, petitioners' crime was not prompted by government misconduct. Thus, neither *McNabb* nor *Russell* is pertinent to a case of alleged misconduct at trial found not to have prejudiced the defendants. In short, petitioners cite no appellate authority that requires dismissal of an indictment under these circumstances, and we know of none.[3]

Finally, while we do not seek to justify the alleged misconduct, the district court has, as the court of appeals noted, ample power to deter prosecutorial misconduct without rewarding the defendant and penalizing the public by allowing guilty defendants to go free (Pet. App. A-6). Cf. *Hampton* v. *United States*, No. 74-5822, decided April 27, 1976, plurality slip op. 6.

2. Petitioners also ask this Court to decide whether a district court has power to dismiss an indictment after a jury verdict on grounds other than sufficiency of the

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[2]There is no suggestion that any alleged government misconduct entrapped petitioners (Pet. App. A-5).

[3]*United States* v. *Banks*, 513 F.2d 1329 (C.A. 8), upon which petitioners also rely, is inapposite. In *Banks* a district court dismissed a prosecution before a jury verdict because of asserted prosecutorial misconduct. The court of appeals did not examine the substance of the government's appeal because it ruled that the order of dismissal was not appealable by the government in light of *United States* v. *Jenkins*, 420 U.S. 358. In petitioners' case, of course, the government's appeal was not barred by the Double Jeopardy Clause, because it resulted only in a reinstatement of the jury verdict and not in a new trial. See *United States* v. *Wilson*, 420 U.S. 332.

evidence or lack of jurisdiction. The government raised this question in the court of appeals, but the court declined to reach it because its disposition of the case made it unnecessary to do so (Pet. App. A-6). Neither the court of appeals in the instant case nor any other court has expressly passed on this question, and there is no reason why this Court should initially undertake to decide it in a case in which the resolution of the question does not affect the correct disposition of the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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